Supreme Court, U.S.
FILED
APR 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1188

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

S. FRANKLIN BURFORD, - - - Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE - - - - - - - Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT K. EMERSON
Counsel of Record

HOWARD R. CREWS, JR.
J. PATRICK JONES
CAMPBELL, WOODS, BAGLEY, EMERSON, McNEER & HERNDON
Post Office Box 1835
Huntington, West Virginia 25719-1835
304-529-2391

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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We believe it to be beyond dispute that the Tax Court may assert jurisdiction only over a tax "deficiency" of a taxpayer as defined in §6211. See, *Selma Heasley* v. *Commissioner,* 45 T.C. 448 (1966). This statute is unambiguous and establishes the following formula to define a "deficiency":

> "Deficiency" = "tax imposed" − "tax upon return" − "amounts previously assessed" + "amount of rebates"

In the instant case, the concepts of "tax imposed," "tax upon return," and "amounts previously assessed" have been properly applied by the respondent and the

United States Tax Court. The sole question here presented is whether the abatement and refund to the petitioner by the respondent of the minimum tax previously assessed constituted a "rebate" which becomes a part of the "deficiency" and increases the deficiency originally asserted.

In his memorandum in opposition, the respondent, by implication, agrees with the analysis above set forth, but argues that the abatement and refund in question constitute a rebate, and that, accordingly, the original deficiency may be increased to include the amount of tax imposed in the minimum tax issue. (Resp. 5). This argument cannot be sustained.

It is undisputed that in 1980 the respondent proposed in his statutory notice a deficiency in income tax of petitioner for the year 1976 in the amount of $328,-702.56. In arriving at this deficiency, the respondent imposed tax of $1,123,544.68 and subtracted therefrom (1) $524,553.01 in tax reported by petitioner on his return, all of which had been paid by wage withholding tax, estimated tax payments and the remittance which accompanied his return, and (2) the prior minimum tax assessment of $270,289.11. No amounts had been rebated at that time. In 1983 the respondent abated the minimum tax assessment made more than six years previously, refunded to petitioner the amounts collected under such assessment, treated the amounts so abated and refunded as a "rebate" and increased the deficiency by such amounts.

A "rebate" is a term of art narrowly defined in §6211(b)(2) to include only that part of an abatement

or refund which was made on the ground that the tax imposed by the respondent was less than the excess of (1) the tax shown on the return plus amounts previously assessed over (2) the amount of any rebates previously made. Therefore, no part of an abatement or a refund qualifies as a rebate for deficiency purposes if the tax imposed is greater than the excess of (1) the tax shown on the return plus amounts previously assessed over (2) the amount of prior rebates.

Regardless of whether the abatement of the minimum tax assessment and resultant refund were proper, it is plain that no part of the abatement or refund may be classified as a "rebate" under the novel circumstances here presented. As noted above, the tax imposed was $1,123,544.68. Obviously, the tax imposed was greater than the sum of $794,842.12, which amount is comprised of $524,553.01 in tax shown upon petitioner's return and the prior minimum tax assessment of $270,289.11. Therefore, no rebate existed for purposes of §6211. This result is dictated not only by statute, but also by respondent's own regulations. See, Treas. Reg. §301.6211-1(f) (1982). Since a rebate did not exist, the Tax Court lacked jurisdiction to increase the original deficiency by the amounts abated and refunded and to consider the minimum tax issue.

The respondent also contends that apart from the requirements of §6211 and, presumably despite the requirements of the §6211, the Tax Court had jurisdiction over the minimum tax issue because, under the provisions of §6214, the respondent may redetermine the correct amount of the deficiency even if the

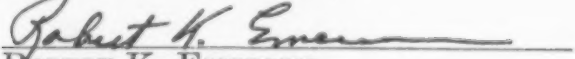
amount so redetermined is greater than the amount set forth in the deficiency notice. (Resp. 4-5). This argument is specious because it begs the question. Section 6214, by its own terms, is limited to the redetermination of a "deficiency" which is defined in §6211. As hereinabove pointed out, the minimum tax issue cannot be considered as part of the "deficiency."

It should also be noted that the cases cited by the respondent in support of the application of §6214 are inopposite because none of those cases involved a prior assessment included in the "deficiency" asserted. Indeed, the Tax Court has limited the scope of §6214 to embrace only those items which comprise a statutory "deficiency." See, *Robert Bregin* v. *Commissioner,* 74 T.C. 1097 (1980)

Respondent gratuitously states (Resp. 4) that "**petitioner does not dispute that he is liable for the full amount of minimum tax asserted by Commissioner." It is petitioner's contention, as set forth in his brief supporting his petition, that petitioner has the right to have the minimum tax issue properly adjudicated by a court of competent jurisdiction subject to the applicable statute of limitations which respondent has attempted to extend by his procedural maneuvers before the Tax Court. By disregarding the required procedures, the respondent has denied the petitioner of this right.

Based upon the foregoing, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,



ROBERT K. EMERSON
Of Counsel of Record

HOWARD R. CREWS, JR.
J. PATRICK JONES
CAMPBELL, WOODS, BAGLEY, EMERSON, McNEER & HERNDON
Post Office Box 1835
Huntington, West Virginia 25719-1835
304-529-2391

PROOF OF SERVICE

The undersigned, of counsel for the petitioner and member of the Bar of this Court, does hereby certify that the foregoing Reply Brief to Memorandum for the Respondent in Opposition has been served in compliance with U. S. Sup. Ct. Rule 28.3 upon all parties required to be served by depositing three copies of the document in a United States Post Office, first-class postage prepaid, addressed to the following counsel of record at their post office address.

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

Roger M. Olsen, Esquire
Acting Assistant Attorney General

Michael C. Paup, Esquire
Richard Farber, Esquire
Mary Frances, Esquire
Tax Division
Department of Justice
P. O. Box 502
Washington, D.C. 20044

Done the 9th day of April, 1987.

Robert K. Ewan

APPENDIX

TREAS. REG. § 301.6211-1(f)(1982).

(f) As used in section 6211, the term "rebate" means so much of an abatement, credit, refund, or other repayment as is made on the ground that the income tax imposed by subtitle A, the estate tax imposed by chapter 11, the gift tax imposed by chapter 12, or the excise tax imposed by chapter 41, 42, 43, or 44, is less than the excess of (1) the amount shown as the tax by taxpayer upon the return increased by the amount previously assessed (or collected without assessment) as a deficiency over (2) the amount of rebates previously made. For example, assume that the amount of income tax shown by the taxpayer upon his return for the taxable year is $600 and the amount claimed as a credit under section 31 for income tax withheld at the source is $900. If the district director determines that the tax imposed by subtitle A is $600 and makes a refund of $300, no part of such refund constitutes a "rebate" since the refund is not made on the ground that the tax imposed by subtitle A is less than the tax shown on the return. If, however, the district director determines that the tax imposed by subtitle A is $500 and refunds $400, the amount of $100 of such refund would constitute a rebate since it is made on the ground that the tax imposed by subtitle A ($500) is less than the tax shown on the return ($600). The amount of such rebate ($100) would be taken into account in arriving at the amount of any deficiency subsequently determined.